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No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF

The Solicitor General's amicus brief devotes a scant two pages to discussing whether there are "compelling reasons" sufficient to justify a grant of certiorari. *See* S. Ct. Rule 10. Such cursory treatment is, to put it mildly, remarkable, given the government's concession that there is no circuit conflict, and that "successful challenges to predatory bidding have to date been rare." U.S. Br. 19-20.[1] Indeed, the government's carefully phrased concession overstates the case. Monopsony bidding cases -- successful and unsuccessful -- are exceedingly rare. There are no more than a half dozen reported in the past century, and only one (the instant case) in the thirteen years since *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The reality is that "predatory bidding" issues simply never arise outside the context of an inelastic natural resources market (because the necessary preconditions are virtually never present outside that context), and arise only rarely even with respect to such markets.

As a result, the most the Solicitor General can offer is tepid speculation that the Ninth Circuit's decision "will tend to discourage *at least some firms* from increasing their output (especially in markets with relatively inelastic supply)." U.S. Br. 20 (emphasis added). Even that halfhearted contention lacks any basis. The Ninth Circuit reached the same result as here for the same reasons twenty-three years earlier in *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983). That decision caused none of the problems about which the government warns and there is no reason to think the instant decision will do so. The Ninth Circuit was careful to limit its holding to situations involving inelastic

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[1] The Federal Trade Commission authorized the filing of a joint amicus brief with the Department of Justice by a vote of 3-2, with Commissioners Jon Liebowitz and J. Thomas Rosch voting no. *See* http://www.ftc.gov/opa/2006/05/fyi0630.htm (FTC Press Release, 5/31/06).

supply -- situations in which the government concedes that predatory bidding can be a successful strategy because the initial rise in input prices will not attract new supply.

Casting further doubt on the government's speculative concerns is the fact that no court has cited the Ninth Circuit's decision in support of a predatory bidding allegation in any context in the more than one year since the decision was rendered. Nor (to respondent's knowledge) has anyone even filed a case alleging "predatory bidding" based on the Ninth Circuit's decision. In the exceedingly unlikely event that courts apply the Ninth Circuit's rationale outside the context of inelastic natural resource markets -- or that empirical or other scholarly analysis demonstrates a chilling effect like that posited by the government -- this Court can address the issue then. There is no reason for review now. And the extreme rarity of "predatory bidding" cases cuts decisively against review for a second reason: there is no developed body of case law or scholarly commentary upon which this Court can draw to decide the case.

At bottom, the Solicitor General's brief is an inappropriate plea for error correction. In view of the salient differences between a buy-side and a sell-side pricing case, the lack of a single false positive result in the handful of reported cases over the last century thereby indicating a virtually nonexistent risk of false positives today, and the absence of developed law or scholarly analysis of the issue, the Ninth Circuit prudently declined to extend the special predatory pricing rule of *Brooke Group* to a broad range of quite different transactions. Instead, the Ninth Circuit applied the general standards for Section 2 liability to this unusual factual situation. Although the government takes issue with one sentence in the jury instructions explicating those general standards, Weyerhaeuser raised no challenge to the jury instructions apart from its contention that the *Brooke Group* test should apply,

and thus any broader question regarding the jury instructions is not before this Court. Moreover, the recent issuance of new ABA model jury instructions for Section 2 cases (which courts almost invariably follow) renders the government's concern about the instructions here academic.

I. NO COMPELLING REASONS SUPPORT FURTHER REVIEW.

1. The government acknowledges the absence of any circuit split; indeed, this is the first case in the thirteen years since *Brooke Group* to consider its applicability to the buy-side.[2] The government also admits that predatory bidding cases are "rare" and fails to point to even one example of a false positive result in such litigation. U.S. Br. 19-20. In view of these realities, one would expect the government to identify some powerful alternative reason to support its recommendation that certiorari be granted. Yet the most the government can muster is groundless speculation that some businesses with market power might decline to bid as aggressively for inputs (in inelastic natural resources markets) as they might otherwise have done.

2. Even worse, the government's professed concern arises not from the Ninth Circuit's unwillingness to replace standard Section 2 instructions with a *Brooke Group* instruction (the issue on which certiorari is sought), but arises instead from a single sentence of the specific jury instruction on overbidding. According to the government, the instruction's

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[2] While acknowledging the "apparent absence of a square circuit conflict," the government's brief nonetheless states in footnote that the Fifth Circuit's analysis in *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (1990) is "in tension" with the Ninth's Circuit's decision here. U.S. Br. 18-19 & n.12. The footnote acknowledges that the one relevant sentence in *In re Beef* contains no actual analysis and is ambiguous at best, and that the case was decided three years *before Brooke Group*.

reference to "paying a higher price for logs than necessary" may "*tend to discourage*" "*at least some* firms," "*especially* in markets with *relatively inelastic supply*," and "*particularly*" in the Ninth Circuit, from increasing their output for fear of antitrust liability. U.S. Br. 20 (emphasis supplied).[3] That attenuated concern does not warrant certiorari, for multiple reasons.

Wholly apart from the fact that Weyerhaeuser never challenged that instruction language below,[4] the single sentence accurately reflected evidence showing that Weyerhaeuser's own executives thought they were spending each year $20 million more than necessary in order to execute their strategy. Pet. App. 19a. That sentence also was part of a lengthy instruction that followed the ABA's then-applicable model instructions for Section 2 cases, and those instructions made clear that Weyerhaeuser could not be held liable on the basis of superior efficiency or on the basis of competition on the merits. *Id.* at 14a n.30 (setting forth instruction). Contrary to the

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[3] As a matter of economics, a dominant firm's increase in inputs and corresponding increase in outputs (assuming no waste, which would be an incorrect assumption in this case), is matched by a decrease in competitors' outputs in an inelastic market. Contrary to the government's contention, a general procompetitive effect from the dominant firm's conduct is not clear in this context.

[4] Notably, the Question Presented -- does *Brooke Group* apply -- does not include an inquiry into the validity of the specific terms of the jury instruction here on overbidding. Weyerhaeuser did not raise such a challenge below, and the Ninth Circuit accordingly made clear that any discussion of the specific terms of the jury instruction is *dictum*:

> Our conclusion that *Brooke Group* does not apply here *disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.*

Pet. App. 5a (emphasis added). Review of *dictum* is not ordinarily a basis for certiorari.

suggestion of the United States, it is hornbook law that jury instructions must be read as a whole. *E.g. California v. Brown*, 479 U.S. 538 (1987).

More generally, the government also contends that "to the extent" the court of appeals' decision may have "approved" a jury instruction that "dispensed with any objective standard," it may propagate an unruly breed of "vague and standardless" jury instructions in other Section 2 cases. U.S. Br. 20. That concern is even more speculative than the preceding one.[5] If any such problem comes to pass, the Court can intercede. There is no reason to do so now.

In this regard, it is significant that the American Bar Association's *Model Jury Instructions In Civil Antitrust Cases* (2005) ("2005 ABA Model Jury Instructions") with respect to anticompetitive conduct also have changed in material ways since this jury was instructed in 2003. Terms such as "*fair* competition" were used in the ABA's 1999 *Sample Jury Instructions In Civil Antitrust Cases* but are not in the ABA's 2005 Model Jury Instructions. 2005 ABA Model Jury Instructions C-26 to C-30; 1999 ABA Sample Jury Instructions C-20 to C-22. The 2005 instructions have adopted a stricter formulation, and require proof that a defendant had *no legitimate business reason* for its conduct in order to make out a claim of anticompetitive conduct. *Id.* Thus, the government's concern about the use of the terms "*fair* price" and "higher price *than necessary*" in the instruction here is highly unlikely to present itself again in the same manner.

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[5] A district court in the Ninth Circuit already has distinguished the decision below because it addressed "attempted monopolization of a single market based on predatory buy-side overbidding ... and [did] not address attempted monopolization in a two-market (wholesale and retail) context, as was alleged in this case." *Standfacts Credit Services, Inc., et al. v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141, 1151 (C.D. Cal. 2005).

2. The absence of any development in the lower courts is significant for another reason: this Court has no body of informed opinion on which to draw to decide whether a special rule is needed for "predatory bidding" cases, or to flesh out the specifics of any such rule. The government suggests (in a footnote) that there is a "growing body of academic literature" that discusses predatory bidding, but fails to note that the issue had received essentially no academic attention before this case was decided just one year ago. U.S. Br. 19 n.13. One clear theme of a recent symposium on buyer power (whose principal contributors were the retained experts in this very case) was that "[w]hat is plainly needed is a good deal of additional work that begins with empirical studies." Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005); *see also* John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 656 (2005) ("there is little legal or economic analysis of predatory bidding"). These competing preliminary analyses hardly provide a basis for formulating a sound rule at this juncture.

The absence of any track record in the lower courts and the extremely limited scholarly treatment create a particularly severe problem for the government's argument that "predatory bidding" should be actionable only when a defendant incurs a "loss." Weyerhaeuser has not proposed a test for what "loss" means in this context. The government, for its part, notes that *Brooke Group* left open the meaning of "loss" in predatory pricing cases, and then asserts that the Court simply could do the same here. U.S. Br. 14 n.5.

But there are critical differences between the two situations. At the time *Brooke Group* was decided, two alternative tests were well-established in the professional literature and the case law – marginal cost and average variable cost – and the Court elected not to choose between them. 509

U.S. at 222 n.1. In this instance, by contrast, there is no corresponding accepted way to measure loss. A court would have to determine whether "loss" is measured by reference to the particular product the defendant makes with the input at issue. If (as is often the case) an input is used for multiple finished products, a court would have to determine whether a defendant had incurred a loss in all of those products or in the specific product at issue. And courts would have to fix upon a definition of "loss" in this context. No court or commentator has even begun the process of setting forth a test. It is no answer to suggest, as the government does, that the issue can be left to the lower courts to decide. Such an approach would spawn significant confusion. It would be imprudent to consider adopting a rule requiring a showing of loss in that circumstance.

II. THE DECISION BELOW IS LIMITED AND CORRECT.

1. Legal and scholarly analysis of what the government calls "predatory bidding" is nascent and grossly underdeveloped, in sharp contrast to the body of legal and scholarly predatory pricing analysis extant when *Brooke Group* was decided. The Ninth Circuit's narrow, case-specific focus in this case of "first impression" was the appropriate judicial response to Weyerhaeuser's request for the court to extend the special Section 2 rule for predatory pricing cases to the quite different situation presented by the range of buy-side transactions.

2. The government's criticism of the Ninth Circuit's analysis is misplaced. The government asserts that the Ninth Circuit failed to consider the effect of higher prices on the sellers of alder sawlogs. U.S. Br. 12-13. That is incorrect. The Ninth Circuit focused primarily on effects in the downstream market because it was responding to Weyerhaeuser's contention that there could be no Section 2

claim absent injury to *downstream consumers* who paid more for the end product. Weyerhaeuser did not raise the issue of effects on sellers until its petition for *en banc* rehearing. *See* Opp. Cert. 25 n.10.

Once the Ninth Circuit determined that there were material differences in the "benefit to consumers and stimulation of competition" between aggressive price-cutting by sellers (*Brooke Group*) and input price-raising by buyers for a "natural resource of limited annual supply in a relatively inelastic market" (this case), there was a sufficient basis for its conclusion that a key underlying premise for *Brooke Group* either did not apply or did not apply with the same force in this case. Pet. App. 9a-11a.

Nonetheless, the court did, in fact, also consider the effects of Weyerhaeuser's conduct on sellers. The decision recognizes that this inelastic natural resource market had no capacity to self-correct by virtue of the relatively fixed amount of supply. Pet. App. 11a. The court thereby recognized that Weyerhaeuser's conduct could have no salutary effect on supply for sellers (which ordinarily in other markets can expand to meet demand) or the ability of new sellers to enter the market. The court also recognized that log sellers would be harmed in the recoupment phase because the monopsonist "would likely pay less for its materials." *Id.* at 10a. This is precisely what happened in the inelastic log market at issue in *Reid Brothers*, a decision that the Ninth Circuit expressly reaffirmed.

3. The government is utterly unconvincing in its suggestion that the Ninth Circuit's decision threatens to create "false positives" either in unusual settings like the one here or more broadly. There is not a single example of a false positive involving alleged predatory overbidding among the small handful of cases that ever have considered the issue over the last century, which suggests that the risk of false positives here

is either nonexistent or extremely low. Moreover, unlike in *Brooke Group*, there is an empirical vacuum here that makes it impossible to assess any risk.

The government nonetheless urges this Court to adopt a bright-line "one size fits all" rule for predatory overbidding without any support in the prior case law. In fact, there are only two cases in the last quarter century to have analyzed this issue -- *Reid Brothers* and this case. Neither is a false positive.

Both cases arose in the context of an inelastic natural resources market in the Ninth Circuit. Both cases involved direct testimony showing specific intent to monopolize. Here, for example, Cliff Chulos, a former Weyerhaeuser manager, testified that Arnold Curtis, the president of Weyerhaeuser's alder division, acknowledged in senior management meetings that Weyerhaeuser had a "strategy of raising log costs" and buying logs for "the purpose of ... keep[ing] logs from competitors," and that Weyerhaeuser expected to "recoup the costs manyfold" once competition was eliminated. TR 3A at 15-16 (SER 157-158); TR 3A at 19 (SER 161).

Both cases involved interlocking combinations of tactics involving pricing and non-pricing conduct. In the instant case, Weyerhaeuser not only *overbid* to push log prices up, but also *overbought*. During the period of predation, this overbuying was designed both to push log prices up in what otherwise would have been a falling market and to deprive its competitors of access to that raw material. In cases involving a complementary relationship between price and non-price conduct, established Section 2 analysis is preferable to adopting special rules applicable to single categories of conduct. *See* Pet. App. 13a-14a (the instructions "as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive").

Extending the *Brooke Group* safe harbor to defendants in predatory overbidding cases in inelastic markets would be especially inappropriate. The annual harvest in the Pacific Northwest of alder trees that take *30 years or more* to mature is a *byproduct* of the much larger softwood harvest. In this classically inelastic market, the cost to Weyerhaeuser of driving up log prices was relatively low because higher prices would not, and did not, increase the amount of logs which Weyerhaeuser would have to buy to keep input prices high and squeeze rivals from the market. Weyerhaeuser's cost of predation was made even lower by controlling a significant share of the alder log supply through a battery of other exclusionary tactics including acquisitions of competitors, exclusive supply contracts and misrepresentations to state officials to secure special access to the alder harvested from the State of Oregon's public forests.

The Ninth Circuit correctly concluded that the same pronounced risk of false positives that animated the Court's decision in *Brooke Group* did not exist here and that an extension of *Brooke Group* therefore would not be warranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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